



U.S. Citizenship  
and Immigration  
Services

FILE: WAC 02 234 52438 Office: CALIFORNIA SERVICE CENTER Date:


IN RE: Petitioner:  
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to § 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized in the State of California that is operating as a catering service. The petitioner claims that it is the branch of the beneficiary's foreign employer, located in Hyderabad, Pakistan. The petitioner now seeks to employ the beneficiary as its chief executive officer-president for three years.

The director denied the petition concluding that the petitioner failed to demonstrate that (1) within one year of approval of the petition the petitioning organization would support the beneficiary in a primarily managerial or executive capacity; and (2) the foreign entity has the financial ability to remunerate the beneficiary and commence doing business in the United States.

On appeal, counsel acknowledges that "substantial information required to support the petition was inadvertently left out." Counsel claims that the brief and supporting documentation submitted on appeal support a finding that the beneficiary is eligible for L classification.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). Specifically, within three years preceding the beneficiary's application for admission into the United States, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

Moreover, pursuant to the regulation at 8 C.F.R. § 214.2(l)(3)(v), if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or be employed in a new office in the United States, the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation;
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:
  - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
  - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
  - (3) The organizational structure of the foreign entity.

The AAO will first address the issue of whether within one year of approval of the petition the petitioner would support the beneficiary in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

- (i) Manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) Supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) Exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

- (i) Directs the management of the organization or a major component or function of the organization;
- (ii) Establishes the goals and policies of the organization, component, or function;
- (iii) Exercises wide latitude in discretionary decision-making; and
- (iv) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

On the nonimmigrant petition filed on July 16, 2002, the petitioner stated that the beneficiary's proposed job duties would include setting up the new catering and decorating business in the United States. In an attached letter from the beneficiary's foreign employer, dated June 21, 2002, the company's general manager stated that the beneficiary would be employed by the U.S. entity in the position of chief executive officer-president, and would also hold such other titles as chief financial officer and secretary. The general manager explained that the beneficiary would be responsible for providing catering and decorating services and would handle the administration of the U.S. entity, including the marketing, personnel, finance and accounting.

In a request for additional evidence, dated August 21, 2002, the director asked that the petitioner submit the following evidence in order to establish that the beneficiary would be employed in the United States in a qualifying capacity within one year of approval of the petition: (1) the U.S. entity's organizational chart identifying the beneficiary's position and the positions of other employees within twelve months of operation; (2) a detailed description of the beneficiary's proposed job duties; (3) a detailed explanation of the proposed number of employees and positions to be filled during the petitioner's first twelve months of operation; (4) each employee's projected wages; and (5) an estimated time table of when the proposed positions would be filled.

Counsel responded in a letter dated November 11, 2002. In the letter, counsel stated that during the first twelve months of operation the beneficiary would be the petitioner's sole employee. Counsel did not provide any additional evidence requested by the director.

In a decision dated January 8, 2003, the director concluded that the petitioner had failed to demonstrate that the beneficiary would be employed in a primarily managerial or executive capacity within one year of approval of the petition. The director noted counsel's failure to sufficiently respond to his request for evidence. The director stated that the record does not demonstrate that the U.S. business would grow to a size where the beneficiary would be employed in a qualifying capacity within one year of approval of the petition, and does not establish "that the beneficiary would work through other employees to achieve the organization's goals." Accordingly, the director denied the petition.

In an appeal filed on February 7, 2003, counsel stated that during the beneficiary's first months of employment in the United States operation, he would be engaged in marketing and logistics, using such marketing tools as brochures, flyers, and hotel contacts to create a demand for the petitioner's services. Counsel stated that over the next three or four months, the beneficiary would hire chefs and service, cleaning, and training personnel, and would employ independent caterers who would be under the beneficiary's supervision. Counsel further explained that within nine months, the beneficiary would hire a general manager of operations, who would also be under the beneficiary's supervision.

Counsel submitted a list of the specific job duties to be performed by the beneficiary and allocated the amount of time the beneficiary would spend on each job duty. Counsel also provided an organizational chart for the United States company identifying the personnel the petitioner anticipates hiring over the first year.

On review, the record does not demonstrate that within one year of approval of the petition the petitioner would employ the beneficiary in a primarily managerial or executive capacity.

It is a well-established rule that the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). In the instant matter, the petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. The AAO, however, will not consider this evidence for any purpose. *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

As correctly determined by the director, the limited job description submitted by counsel fails to demonstrate that the beneficiary would be employed by the United States organization in a qualifying capacity within one year of approval of the petition. This conclusion is supported by counsel's brief response to the director's request for evidence, in which he stated that the beneficiary would be the petitioner's sole employee during the first twelve months of operation. As the petitioner previously stated in its June 21, 2002 letter that the beneficiary would be responsible for such non-qualifying job duties as marketing, personnel, finance, and the company's administration, it is clear from counsel's subsequent response that the beneficiary would not be relieved of performing these job duties within a year of the petition's approval. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). Moreover, because there is no evidence that the petitioner would hire subordinate employees during its first year of operations, the beneficiary would not be supervising and controlling the work of other supervisory, professional, or managerial employees. *See* 8 C.F.R. § 214.2(l)(1)(ii)B)(2). Furthermore, the petitioner's failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

An additional issue addressed by the director that relates to the present issue of establishing employment in a managerial or executive capacity is whether the foreign entity has the financial ability to remunerate the beneficiary and to commence doing business in the United States.

The petitioner submitted with the nonimmigrant petition financial documentation relating to the foreign entity, including the company's June 30, 1999 and June 30, 2001 balance sheets and its trading and profit and

loss account summaries for the period ending June 30, 2001. The statements reflected all monetary amounts in rupees. The director subsequently requested that the petitioner provide its balance sheet and financial statements that have been translated into U.S. dollars. Counsel submitted the foreign entity's translated balance sheets for the years 1999, 2000, and 2001 and translated trading and profit and loss statements for 2000 and 2001.

In his decision, the director stated that the foreign entity's balance sheets for the years 2000, 2001, and 2002 reflect cash balances in the amounts of \$3,566.61, \$3,860.31, and \$1,160.61, respectively. The director also noted that the petitioner's checking account indicated a balance of \$13,000. The director concluded that there was insufficient evidence to demonstrate that the foreign entity has the financial ability to remunerate the beneficiary and to commence doing business in the United States.

On appeal, counsel states that the foreign entity's balance sheet does not include real property owned by the "[S]heikh" family, which has an estimated value of \$266,931. Counsel encloses a property deed as evidence of ownership. Counsel explains because of the "uniqueness" of the petitioner's catering business, which is focused on a specific ethnic group, the business does not require large amounts of capital. Counsel states that the capital projections for the petitioning organization indicate that the petitioner needs only \$16,599 to successfully operate during its first six months. Counsel further states that the petitioner currently has \$13,000, as well as a line of credit for an additional \$22,000.

On review, the petitioner has not provided sufficient evidence to establish that the foreign entity has the financial ability to remunerate the beneficiary and to commence doing business in the United States. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Simply asserting that the foreign entity's financial statements did not include the value of its real properties does not qualify as independent and objective evidence. Even if the Sheikh family owns properties valued at approximately \$266,000, there is no evidence that the foreign entity has access to the use of any profits generated from the sale of the properties. In fact, while counsel implies that the Sheikh family owns the foreign entity, counsel has not provided any evidence establishing this relationship. Therefore, counsel's claim on appeal is not relevant to determining the foreign entity's financial ability.

Additionally, the regulation at 8 C.F.R. § 103.2(b)(3) requires that any document containing foreign language submitted to Citizenship and Immigration Services (CIS) must be accompanied by a full English translation that has been certified by a translator as complete and accurate. While counsel submitted translated financial statements, the documents were not certified as complete and accurate. Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding.

The petitioner has failed to demonstrate that within one year of approval of the petition the United States operation would support the beneficiary in a primarily managerial or executive capacity. For this reason, the appeal will be dismissed.

Beyond the decision of the director, an additional issue is whether the beneficiary was employed by the foreign entity in a qualifying capacity. The petitioner explained in its June 2002 letter that the beneficiary had been employed abroad in such positions as a cook, an administrator, and in marketing and purchasing. In its response to the director's request for evidence, the petitioner identified the beneficiary on the foreign entity's organizational chart as the president-owner, and listed his job responsibilities as: preparing proposals for new

accounts, planning functions, including site preparation and ordering supplies, and financial and personnel management. Not only is the record inconsistent with regard to the actual position held by the beneficiary while employed abroad, but it demonstrates that the beneficiary was likely performing the non-qualifying operations of the business. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. at 604. The AAO cannot conclude that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity. For this reason, the appeal will be dismissed.

An additional issue not addressed by the director is whether the petitioner demonstrated the existence of a qualifying relationship between the foreign entity and United States organization. The regulations and case law confirm that the key factors for establishing a qualifying relationship between the U.S. and foreign entities are ownership and control. *Matter of Siemens Medical Systems, Inc.* 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982); see also *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988) (in immigrant visa proceedings). In the context of this visa petition, ownership refers to the direct and indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N at 595. As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity.

In the instant matter, the petitioner noted on the nonimmigrant petition that the United States organization is a branch of the foreign entity. The regulations define the term "branch" as "an operating division or office of the same organization housed in a different location." 8 C.F.R. § 214.2(l)(1)(ii)(J). Probative evidence of a branch office would include the following: a state business license establishing that the foreign corporation is authorized to engage in business activities in the United States; copies of Internal Revenue Service (IRS) Form 1120-F, U.S. Income Tax Return of a Foreign Corporation; copies IRS Form 941, Employer's Quarterly Federal Tax Return, listing the branch office as the employer; copies of a lease for office space in the United States; and finally, any state tax forms that demonstrate that the petitioner is a branch office of a foreign entity. However, if the petitioner submits evidence to show that it is incorporated in the United States, then that entity will not qualify as "an . . . office of the same organization housed in a different location," since that corporation is a distinct legal entity separate and apart from the foreign organization. See *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). The petitioner provided the U.S. organization's articles of incorporation identifying the petitioner as a California corporation. Therefore, the petitioner cannot be considered a branch of the foreign entity.

If the claimed branch is incorporated in the United States, CIS must examine the ownership and control of that corporation to determine whether it qualifies as a subsidiary or affiliate of the overseas employer. The petitioner submitted with the nonimmigrant petition one stock certificate, which identifies the foreign corporation as the owner of 1,000 of the U.S. entity's 10,000 authorized shares of stock, and the minutes from the petitioner's March 7, 2002 board of director's meeting indicating that the foreign entity received the stock in consideration for \$10,000.00. Additional documentation indicates that an individual "Tamhid Alam" actually funded the U.S. operation with \$13,000 in exchange for a debt of \$35,000 that he owned to the foreign entity. There is both insufficient and inconsistent evidence in the record that the United States organization was actually funded by the foreign entity. The petitioner is obligated to clarify the inconsistent

and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. at 591-92. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). As a result, the AAO cannot conclude that the foreign entity possesses ownership and control of the U.S. organization. The petitioner has not established the existence of a qualifying relationship between the foreign and United States entities. For this reason, the appeal will be dismissed.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, that burden has not been met. Accordingly, the director's decision will be affirmed and the petition will be denied.

**ORDER:** The appeal is dismissed.